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No. 97-1635

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran Corporation, and HONDURAS AIR REGISTRY BUREAU, LIMITED, a Bahamian Corporation,

Respondents.

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

OMEGA AIR S de RL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Respondent Omega Air S de RL, pursuant to Rule 29.6, provides the following list of the parent companies and nonwholly owned subsidiaries of Omega Air S de RL:

1. Omega Air, Ltd. – a parent company.

Omega Air, Ltd. has no subsidiaries.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Omega Air S de RL ("Omega"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 129 F.3d 543 (11th Cir. 1997).

REPLY TO STATEMENT OF THE CASE

Omega submits the following Reply to Statement of the Case to present to the Court the areas of disagreement with the statement submitted by Petitioners, and to supply important information that has been omitted.

In a blatantly obvious effort to color the proceedings below, Petitioners have presented the Statement of the Case in a biased and argumentative fashion. For instance, Petitioners continually label the agreed-upon duties of Respondents Honduras Aircraft Registry, Ltd. and Honduras Air Registry Bureau, Limited (collectively "HAR") under the relevant contract as a "government function". Conspicuously absent from Petitioners' Statement of the Case, however, is a recitation of the terms of that contract which give rise to this case. Labels notwithstanding, it is the terms of the contract, and the finding of the Eleventh Circuit that the contract was for the sale of goods and services, which is relevant.

As recited by the Eleventh Circuit, in return for the consideration of charging a fee to the aircraft owners, HAR agreed to inspect commercial aircraft for certification in Honduras, a function which nations can, and

often, delegate to private entities pursuant to the Chicago Convention of the International Civil Aviation Organization. HAR agreed to provide Petitioner, the Government of Honduras ("Honduras"), with economic assistance in completing aircraft inspections outside Honduras and establishing cooperative relationships with the United States Federal Aviation Administration (FAA), the International Organization of Civil Aeronautics, and the air authorities of other nations. In particular, the parties contracted to:

> Provide a center of computing and adequate installation for the airworthiness section, including computers, photocopiers, telex, typewriters and fax, development of necessary programs for the establishment of the data base with the information related with the aircraft to be inspected and that will be under Honduran registry. To start, the equipment will be that which is necessary to manage the data of 100 aircraft and must provide additional equipment each time that the necessities of expansion require it. It is understood that this equipment will be permanently in communication with the principal data base managed in the Offices of the Inspector located in Miami, Florida, USA and will be accessed by modem.

It is the breach of this contract, and Petitioners' concomitant conduct which gave rise to Omega's damages. Because this case arises from a motion to dismiss Omega's Amended Complaint, the factual allegations of the Amended Complaint are assumed to be true. *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

The contract, titled "Contract of Technical Assistance" ("Agreement"), was entered into between HAR and Honduras on June 4, 1992, and later modified on December 16, 1993. (R1-1-4)[1]. The express purpose of the Agreement was to encourage international air carriers, like Omega, to register their aircraft in Honduras and to create an entity based in the United States to facilitate those registrations, perform related inspections and document the carriers' compliance with the requirements of various international aviation authorities. (R1-1-14).

In furtherance of those objectives, HAR published brochures and paid for advertisements in various industry publications, all of which were intended to induce, and in fact did induce, air carriers to have their aircraft inspected by HAR and register their aircraft in Honduras. (SR1-35-3).

Omega utilized HAR's services for five of its aircraft and subsequently registered those aircraft in Honduras. (SR1-35-4). In doing so, Omega relied upon the viability of the Agreement. (SR1-35-4). Thereafter, Omega operated its Honduran registered aircraft in full compliance with the regulations of Honduras and all of its applicable regulatory agencies. (SR1-35-4).

Subsequently, Petitioner Guillermo Chirinos, the Director General of Civil Aeronautics of Honduras, advised the FAA that the Decree which ratified the Agreement was invalid or had been revoked. (SR1-35-4).

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[1] The record references are to the record before the Eleventh Circuit, and represent the volume number-document number-page number.

That action of Petitioners caused the grounding of Omega's Honduran registered aircraft, leaving thousands of passengers stranded, resulted in millions of dollars of lost revenues and profits, and caused irreparable injury to Omega's business reputation. (SR1-35-4).

Omega was permitted to intervene in the action filed by HAR, and alleged in its Amended Complaint that it was a third party beneficiary to the Agreement. (SR1-35-5) Omega further alleged that Petitioners had breached the Agreement by (1) failing to disclose that Omega's aircraft could not be properly registered by utilizing HAR's facilities, (2) wrongfully cancelling the authority of HAR to facilitate the proper registry of aircraft in Honduras, and (3) thereby causing the grounding of Omega's aircraft. (SR1-35-5).

Omega further stated a cause of action for tortious interference with advantageous business relations alleging that Petitioners knew Omega was using its aircraft to accommodate passengers and customers, and knew that their actions would ground the aircraft thereby disrupting the business relations between Omega and its customers. (SR-1-35-6).

Omega further sought injunctive relief compelling Petitioners to issue valid Certificates of Airworthiness on its five aircraft so as to allow Omega to re-register them in another country, and return them to service. (SR1-35-8).

Petitioners moved to dismiss Omega's Amended Complaint, arguing among other points that they were

immune pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605. That motion was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The Question Presented In The Petition.

The sole Question Presented by Petitioners is whether the FSIA, 28 U.S.C. § 1605(a)(2), immunizes a foreign government for claims based on "sovereign acts", when those sovereign acts are "connected" with commercial activities. The Eleventh Circuit, however, did not decide that question in this proceeding. Moreover, the facts of record do not support a determination of that question by this Court.

Contrary to the Question Presented by Petitioners, the Eleventh Circuit made a specific finding that the acts complained of by Respondents were not in any manner sovereign, but rather commercial. As the court stated:

> [Respondents] contracted to provide goods and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. [Respondents] merely seek to enforce that contract.
>
> * * *
>
> When Honduras commercially entered the market it did so as a private player to secure certain technical assistance and whatever else it needed to upgrade and expand its civil air program.

> Honduras did not enter the technical assistance market to regulate that market as a sovereign, but to participate in it as an individual could.

The Eleventh Circuit clearly determined that Petitioners had engaged in commercial, not sovereign activity. Moreover, the facts of record, as determined by the district court and recited by the Eleventh Circuit, do not permit the formulation of Petitioners' Question Presented which is founded on the false premise that Respondents' claims are based on a sovereign act. As the Eleventh Circuit recited, under the Agreement HAR agreed to provide the necessary equipment and assistance in developing a program for the inspection of aircraft that will be under Honduran registry.

In return for providing the technical assistance, HAR was entitled to charge the aircraft owners a fee. There is no finding by the Eleventh Circuit, or fact in the record, from which the Question Presented can be derived. The Question Presented cannot be extracted from the opinion below.

2. Absent A Ruling From The Eleventh Circuit That Any Of The Complained Of Conduct Of Petitioners Was Sovereign, There Is No Reason To Grant The Petition.

As has been demonstrated above, the Eleventh Circuit did not rule that sovereign activity of Petitioners is

not immune under the FSIA. Rather the court held, as has every other court to address the issue, including this Court, that the commercial activity of a sovereign is not immune under the FSIA. Accordingly, the decision of the Eleventh Circuit does not qualify for review.

The FSIA was enacted to "restrict" immunity of foreign states to public acts. *Republic of Argentina v. Weltover*, 504 U.S. 607, 612 (1992); H. R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in*, 1976 U.S. Code Cong. & Admin. News 6604, 6605. When a foreign state chooses to engage in commercial activity and subject itself to the world marketplace, Congress has specifically provided that the foreign state may be liable for the consequences of its conduct. 28 U.S.C. § 1605(a)(2). The purpose of the FSIA is to have "all participants in the marketplace of the world to be treated as equals, and to ascribe to the principles of trade which found their birth in the law-merchant, centuries ago." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 316 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). In short, "[o]nce a sovereign enters the marketplace as a commercial actor, it should be subject to all the rules of the marketplace." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 151 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

It is for the courts to determine on a case-by-case basis the distinction between "commercial" and "governmental" activity. *Rush-Presbyterian – St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 577 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989). Congress, however, has provided the courts with specific guidelines. The drafters of the FSIA clearly intended that contracts for the sale of goods and services entered into by foreign states are

presumptively commercial activity. As stated by Bruno Ristau, Chief of the Foreign Litigation Section of the Department of Justice:

> [If] a government enters into a contract to purchase goods and services, that is considered a commercial activity. It avails itself of the ordinary contract machinery. It bargains and negotiates. It accepts an offer. It enters into a written contract and the contract is to be performed.

Hearings on H.R. Rep. No. 11315 Before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary, 94th Cong. 2d Sess. 51 (1976). The breach of a sales contract or any "business tort" associated with it is deemed to be commercial activity. H. R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in*, 1976 U.S. Code Cong. & Admin. News 6604, 6615-16.

Moreover, the *reason* that the foreign state entered into the contract is irrelevant. It is the nature of the contract which determines whether the contract constitutes "commercial" or "governmental" activity. 28 U.S.C. § 1603(d). *See also, Saudi Arabia v. Nelson*, 507 U.S. 349, 359 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). If the challenged activity is the type which private persons ordinarily perform, the activity is commercial and not immune under the FSIA. *Weltover*, 504 U.S. at 614. To hold otherwise would vitiate the "restrictive" nature of the FSIA since every contract by a sovereign state is to some extent for a public purpose. *DeSanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393 (5th Cir. 1985).

Contrary to Petitioners' empty claims, the Agreement here concerns only Respondents' ability to engage in commercial activity. The Eleventh Circuit held quite clearly, as a matter of fact, that the contract called for HAR to provide equipment and technical assistance. The Eleventh Circuit held specifically that the contract did not call for HAR to register aircraft. Rather, the contract requires HAR "to provide the means and do the technical work so that Honduras itself could then register the aircraft in accordance with the contract." *Honduras v. Honduras Aircraft Registry, Ltd.*, 129 F.3d 543 (11th Cir. 1997).

Petitioners contend that the Eleventh Circuit's decision is in conflict with *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984), and boldly proclaim that the two cases "are identical". *MOL* is completely distinguishable from the instant case. There, a company sued the Republic of Bangladesh for terminating a licensing agreement to export a natural resource of the country – rhesus monkeys. The Ninth Circuit held Bangladesh to be immune under the FSIA because a licensing agreement entered into by a foreign state which regulates its natural resources is an agreement that a private party could not enter into.

The contract in *MOL* actually regulated the state's natural resources – it did not merely facilitate the state's ability to do so itself. Here, the Agreement does not authorize Respondents to register aircraft – a sovereign function. It merely facilitates Honduras's ability to do so itself.

Petitioners argue that the complained of activity is sovereign because it supported the regulation of aircraft registration and airworthiness, which is a government function. This is the same argument which has been consistently rejected by the courts.

For instance, in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 316 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), the Republic of Nigeria repudiated a contract to purchase cement and argued that it was immune under the FSIA because the contract was entered into in support of Nigeria's system of building its infrastructure. The court rejected this argument on the basis that the contract's "purpose – to build roads, army barracks, whatever, is irrelevant." *Texas Trading*, 647 F.2d at 310. The court held Nigeria's conduct to be commercial despite that Nigeria had effected the breach by issuing "sovereign" orders regulating entry into Nigerian ports.

In *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985), the Republic of Iran was sued for breaching a contract to buy equipment for armed services. The court held the contract to be commercial – the governmental purpose for the equipment did not change the nature of the activity.

In *Callejo v. Bancomer, S.A.*, 764 F.2d 1102 (5th Cir. 1985), the plaintiffs sued a Mexican national bank for breaching the terms of a certificate of deposit by redeeming the certificate in devalued pesos rather than dollars. The bank claimed immunity under the FSIA because its actions were pursuant to the promulgation of exchange regulations. The court rejected the argument and held that although the promulgation of exchange rates was a

sovereign act, selling and breaching the certificates was commercial activity.

Contrary to Petitioners' assertions, there is no conflict among the circuits. It has been consistently held that commercial activity, even if done for a governmental purpose, is not immune under the FSIA.

Petitioners' further contentions, regarding what it calls the "varying tests" used by the courts, should be given short-shrift. In an attempt to convince this Court that the various Circuits have not consistently ruled on issues concerning the FSIA, Petitioners label three supposed tests applied by the courts to discern what type of activity constitutes commercial activity. Firstly, the courts have not applied different tests. They have simply ruled on the facts on a case-by-case basis.

Moreover, even if one could place a label on the various decisions of the courts and place each into its appropriate pigeon hole (which one cannot do because each case is fact-distinctive), the decade-old and unpublished decisions cited by Petitioners do not demonstrate any lack of uniformity among the courts. All of the cases cited by Petitioners were decided prior to this Court's decisions in *Nelson* and *Weltover*. In those cases this Court explained exactly what type of activity constitutes commercial activity:

> [W]e conclude that when a foreign government acts, not as a regulator of a market, but in a manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature"

> rather than its "purpose", 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce."

Weltover, 504 U.S. at 614.

> [A] foreign state engages in commercial activity for purposes of the restrictive theory only where it acts in the manner of a private player within the market.

Nelson, 507 U.S. at 360.

The rulings of this Court have provided all courts with the guidance that Petitioners now claim is needed. The Eleventh Circuit applied those exact criteria to determine that the activity complained of in the instant case was commercial activity. There is no conflict among the circuits, and the ruling of the Eleventh Circuit was correct.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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